

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 TOP RANK BUILDERS, INC., and
5 EFRAIN RENE MORALES MORENO,

6 Plaintiffs,

7 v.

8 CHARLES ABBOTT ASSOCIATES, INC.;
9 WILLIAM B. BROWNING; AMERICAN
10 WIND & SOLAR, INC.; COUNTY OF NYE;
11 DOES I through X, inclusive; and ROE
ENTITIES XI through XX, inclusive,

Defendants.

Case No. 2:16-cv-02903-APG-CWH

**ORDER GRANTING DEFENDANT
NYE COUNTY'S MOTION TO
PARTIALLY DISMISS**

(ECF No. 11)

12 Plaintiffs Top Rank Builders, Inc. and Efrain Morales are suing Charles Abbott
13 Associates, Inc. (CAA), William Browning, American Wind & Solar, Inc. (American), and Nye
14 County for injuries allegedly caused by Browning abusing his position as a building official in
15 Nye County.¹ Nye County moves to dismiss the racketeering claims against it, arguing that as a
16 government entity, it cannot be held liable under racketeering statutes. Top Rank and Morales
17 attempt to distinguish the cases cited by Nye County and move to amend their complaint.

18 The Ninth Circuit has held that government entities are incapable of forming the intent
19 necessary to support a federal Racketeer Influenced Corrupt Organizations Act (RICO) action.
20 While the Supreme Court of Nevada has not yet ruled on this specific issue with respect to the
21 state racketeering statute, it has held that the statute is patterned on the federal RICO statute. The
22 requirement of criminal intent to engage in racketeering activity is consistent across both statutes.
23 Therefore, I grant Nye County's motion to dismiss both racketeering claims against it.

24 **I. BACKGROUND**

25 In August, 2011, CAA renewed its Professional Services Agreement (PSA) with Nye
26 County to establish, maintain, and staff a building and safety services department. ECF No. 1 at 5.

27 ¹ Two other defendants, Sundance Builders, LLC and Thomas Frank, were voluntarily dismissed
28 without prejudice. ECF No. 21.

1 William Browning, an employee of CAA, was employed as the “building official” of the
2 Pahrump Building & Safety Department and was in charge of administration and enforcement of
3 building codes. *Id.* at 6. Browning also served on the Capital Improvements Advisory Committee
4 for the Pahrump Regional Planning District as a voting administrative official and member. *Id.* at
5 7. When Nye County began the selection process for licensed medical marijuana facilities in
6 2014, Browning was an integral party to the process alongside the Nye County Planning
7 Department. *Id.*

8 Top Rank and Morales were under contract with one of the prospective licensees, Green
9 Cross of America, Inc.. *Id.* at 8. After Green Cross won approval of its special use application,
10 Top Rank and Morales entered into a “definitive agreement” to be the general contractor on the
11 medical marijuana facility project. *Id.* at 8–9. At some later point, Morales visited the job site and
12 saw an American employee looking at plans for the project. *Id.* at 9. Morales was then informed
13 by Green Cross that Browning had told it that if it “replaced Top Rank, with Browning, Green
14 Cross would never have to worry about a building permit again.” *Id.* Green Cross told Morales
15 that Browning intended to use another contractor as a front for Browning and American.² *Id.*
16 Browning allegedly delayed issuing permits to the Green Cross project to pressure Green Cross
17 into replacing Top Rank with Browning’s front contractor. *Id.* at 10.

18 Top Rank and Morales allege Nye County had “actual or constructive knowledge” of
19 Browning’s conduct, which breached the PSA’s requirement that no CAA employees be
20 financially interested in matters connected to CAA’s functions under the agreement. *Id.* Further,
21 Nye County did not declare a breach of the agreement based on its knowledge of Browning’s
22 activities, nor did it take action to prevent Browning from using his position for private gain. *Id.*
23 at 10–11.

24 In 2016, Browning delayed approving another work permit for Top Rank and allegedly
25 used the delay to contact property owners and convince them to use his companies rather than
26 Top Rank. *Id.* at 11. Finally, Top Rank and Morales allege Browning “caused a false and
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28 ² Browning is the president, secretary, and treasurer of American. ECF No. 1 at 3.

1 meritless claim to be filed” against Top Rank and Morales with the Nevada State Contractors
2 Board. *Id.* Nye County refused to withdraw the complaint. *Id.*

3 Top Rank and Morales filed suit against CAA, Browning, American, and Nye County
4 alleging, among other things, claims against Nye County for federal racketeering under 18 U.S.C.
5 § 1962 and state racketeering under Nevada Revised Statutes § 207.470. Nye County moves to
6 dismiss these racketeering claims.

7 **II. ANALYSIS**

8 A properly pleaded complaint must provide a “short and plain statement of the claim
9 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*,
10 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands
11 more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of
12 action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Factual allegations must be enough to rise
13 above the speculative level.” *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a
14 complaint must “contain[] enough facts to state a claim to relief that is plausible on its face.”
15 *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation omitted).

16 I apply a two-step approach when considering motions to dismiss. *Id.* at 679. First, I must
17 accept as true all well-pleaded factual allegations and draw all reasonable inferences from the
18 complaint in the plaintiff’s favor. *Id.*; *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir.
19 2013). Legal conclusions, however, are not entitled to the same assumption of truth even if cast
20 in the form of factual allegations. *Iqbal*, 556 U.S. at 679; *Brown*, 724 F.3d at 1248. Mere recitals
21 of the elements of a cause of action, supported by only conclusory statements, do not suffice.
22 *Iqbal*, 556 U.S. at 678.

23 Second, I must consider whether the factual allegations in the complaint allege a plausible
24 claim for relief. *Id.* at 679. A claim is facially plausible when the complaint alleges facts that
25 allow the court to draw a reasonable inference that the defendant is liable for the alleged
26 misconduct. *Id.* at 663. Where the complaint does not permit the court to infer more than the
27 mere possibility of misconduct, the complaint has “alleged—but it has not shown—that the
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1 pleader is entitled to relief.” *Id.* at 679 (internal quotation marks and citations omitted). When the
2 claims have not crossed the line from conceivable to plausible, the complaint must be dismissed.
3 *Twombly*, 550 U.S. at 570. “Determining whether a complaint states a plausible claim for relief
4 will . . . be a context-specific task that requires [me] to draw on [my] judicial experience and
5 common sense.” *Iqbal*, 556 U.S. at 679.

6 **a. Federal RICO claim**

7 Top Rank alleges Nye County is liable for racketeering under 18 U.S.C. § 1962.
8 However, government entities are not proper defendants in federal RICO actions because they are
9 “incapable of forming [the] malicious intent necessary to support a RICO action.” *Pedrina v.*
10 *Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996) (alteration in original) (internal quotation omitted). In
11 addition, liability cannot be imposed “on the ‘body politic’ by appeals to the doctrine of
12 *respondeat superior* or to principles of agency.” *Lancaster Cmty. Hosp. v. Antelope Valley Hosp.*
13 *Dist.*, 940 F.2d 397, 404 (9th Cir. 1991). Therefore, I dismiss the federal racketeering claim
14 against Nye County. Amendment would be futile, so I deny leave to amend. *See Nunes v.*
15 *Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (“Futility alone can justify the denial of a motion for
16 leave to amend.”).

17 **b. State civil racketeering claim**

18 Nevada has not yet determined whether government entities can be liable under its civil
19 RICO statute. In the absence of controlling state law, I must predict how the Supreme Court of
20 Nevada would decide the issue. *See Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d
21 1219, 1222 (9th Cir. 2003). That court has stated that “Nevada’s anti-racketeering statutes . . . are
22 patterned after the federal . . . ‘RICO’ statutes.” *Hale v. Burkhardt*, 764 P.2d 866, 867 (Nev.
23 1988); *see also Allum v. Valley Bank of Nev.*, 849 P.2d 297, 298 n.2 (Nev. 1993).

24 The Supreme Court of Nevada noted in *Hale* that “Nevada’s civil RICO statute differs in
25 some respects from the federal civil RICO statute.” 764 P.2d at 868. However, the court did not
26 elaborate, and went on to interpret the Nevada statute consistently with the United States Supreme
27 Court’s interpretation of the federal statute. *Id.*

1 In *Siragusa v. Brown*, the Supreme Court of Nevada held that, unlike the federal RICO
2 statute, Nevada's statute did not have a "pattern/continuity requirement." 971 P.2d 801, 810–11
3 (Nev. 1998). The federal statute requires plaintiffs to plead a "pattern of racketeering activity,"
4 which is defined to "require at least two acts of racketeering activity." *Id.* at 810 (quoting 18
5 U.S.C. §§ 1961–1962). In contrast, the Nevada statute requires plaintiffs to show "racketeering
6 activity," which "means engaging in at least two crimes related to racketeering" Nev. Rev.
7 Stat. §§ 207.390–.400). This difference between "require" and "means" created a "critical
8 distinction" between the pleading requirements of the state and federal statutes. *Siragusa*, 971
9 P.2d at 810. However, "racketeering activity" as defined in both statutes requires criminal
10 activity. *See* 18 U.S.C. § 1961; Nev. Rev. Stat. § 207.390. Criminal intent is thus as necessary
11 under the Nevada RICO statute as the federal RICO statute.

12 I predict that the Supreme Court of Nevada would follow the Ninth Circuit in holding that
13 government entities are not proper defendants under the Nevada RICO statute. Therefore, I
14 dismiss the state racketeering claim against Nye County. Amendment would be futile, so I deny
15 leave to amend.

16 **III. CONCLUSION**

17 IT IS THEREFORE ORDERED that defendant Nye County's motion to dismiss the
18 federal and state racketeering claims against it (**ECF No. 11**) is **GRANTED**.

19 DATED this 6th day of October, 2017.

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23 ANDREW P. GORDON
24 UNITED STATES DISTRICT JUDGE
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